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No. 327

IN THE

Supreme Court of the United States

October Term, 1961.

On Appeal from the Supreme Court of the State of Ohio

CITY OF AKRON, ET AL.,

Appellant,

vs.

THE STATE OF OHIO, EX REL., MARK McELROY, ATTORNEY GENERAL,

Appellee.

JURISDICTIONAL STATEMENT

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THE STATE OF OHIO, EX REL., MARK McELROY, ATTORNEY GENERAL,

Appellee.

JURISDICTIONAL STATEMENT

Appellant, City of Akron, appeals from the final judgment of the Supreme Court of the State of Ohio, entered on March 14, 1962, reversing the Court of Appeals and entering final judgment against Appellant and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Summit County, Ohio is reported in 168 N. E. 2d 500 and incorporated herein as Appendix A. The Journal Entry of the Court of Common Pleas is unreported and is included and incorporated herein as Appendix B. The opinion of the Court of Appeals is unreported and is included and incorporated herein as Appendix C. The Journal Entry of

the Court of Appeals is unreported and is included and incorporated herein as Appendix D.

The decision of the Supreme Court reversing the Court of Appeals, and rendering final judgment for appellant is reported in 173 O.S. 189 and is included and incorporated herein as Appendix E.

The Journal Entry of the Supreme Court of Ohio is included and incorporated herein as Appendix F.

JURISDICTION

The judgment and final order of the Supreme Court of Ohio was entered March 14, 1962.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U. S. C. Section 1257 (2 & 3).

QUESTIONS PRESENTED

1. The Supreme Court of Ohio erred in holding that Section 1547.61 of the Revised Code of Ohio (Watercraft Act) prohibiting political subdivisions of the State from imposing any license fees or other charges on owners of watercraft for right or privilege of operating watercraft on waters owned by such subdivisions does not deprive the municipality of property without due process of law in violation of the 5th Amendment of the Constitution of the United States.
2. The Supreme Court of Ohio erred in holding Section 1547.61 of the Revised Code of Ohio (Watercraft Act) prohibiting political subdivisions of State from imposing any license fees or other charges on owners of watercraft for right or privilege of operating watercraft on waters owned by such subdivisions does not violate homerule amendment of the Constitution of Ohio, Article 18, Section 3.
3. It is inconsistent for the State of Ohio to prohibit private owners of waters and municipalities owning waters from imposing charges for operating watercraft on those waters and at the same time say that they, the private owners of waters and municipalties owning waters, have the right to say who may or may not use such waters.

STATUTES INVOLVED

Section 1547.61 of the Revised Code of Ohio

The provisions of Chapter 1547. of the Revised Code and of other applicable laws of this state govern the operation, equipment, numbering, and all other matters relating thereto whenever any watercraft is operated on the waters of this state, conservancy district, or political subdivision of this state, or when any activity regulated by Chapter 1547. of the Revised Code takes place thereon; but nothing in Chapter 1547. of the Revised Code prevents the adoption of any rules, regulations, or ordinance relating to operation and equipment of vessel the provisions of which are identical to the provisions of Chapter 1547. of the Revised Code, amendments thereto, or regulations issued thereunder; provided, that such ordinances shall be operative only so long as and to the extent that they continue to be identical to the provisions of Chapter 1547. of the Revised Code. Conservancy districts and political subdivisions of this state may enact ordinances, rules, or regulations limiting the horsepower of inboard or outboard motors, maximum and minimum size and type of watercraft, inflatable watercraft, and the speed at which watercraft may be operated, except that upon impounded bodies of water covering three thousand five hundred acres of land or more, no conservancy district or political subdivision shall prohibit the use of motors of sixty-five horsepower or less when used in conjunction with properly proportioned boats in a reasonable area to be designed for the use of said motors and boats and for water skiing and provided further that upon Tappan Lake, for a period of three years after the effective date of this act, no conservancy district or political subdivision shall prohibit the use of motors of fifty horsepower or less when used in conjunction with properly proportioned boats in a reasonable area to be designed for the use of said motors and boats and for water skiing.

Any department, conservancy district, or political subdivision of this state, may at any time, but only after public notice published in a newspaper of local circulation, make formal application to the administrator of the division of watercraft for special rules and regulations with reference

to the operation of vessels on any waters within its territorial limits and shall set forth therein the reasons which make such special rules and regulations necessary or appropriate.

The division of watercraft may make special rules and regulations with reference to the operation of watercraft on any waters within the territorial limits of any subdivision of this state.

No political subdivision of this state or conservancy district shall charge any license fee or other charge against the owner of any watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivision or conservancy district and no license or number in addition to those provided for herein shall be required by any state department, conservancy district, or political subdivision of this state.

Fifth Amendment of the United States Constitution.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article I Section 19 of the Ohio State Constitution

Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money: and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article XVIII Section 3 of the Ohio State Constitution

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Article XVIII Section 4 of the Ohio State Constitution

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

STATEMENT OF THE CASE

Petition was originally filed in this instance in the Court of Common Pleas, Summit County on behalf of the State of Ohio, seeking to enjoin defendant, City of Akron, and Ohio municipal corporation in Summit County, and certain of its officials, named as defendants, from the issuance and requirement of separate city boat licenses for the operation of watercraft on Mogadore Reservoir in Portage County, or other reservoirs owned or controlled by them, contrary to Section 1501.42 et seq., Ohio Revised Code, (now Sec. 1547.01 Revised Code of Ohio) and the specific prohibition of Section 1501.23, Ohio Revised Code, (now Sec. 1547.61, Revised Code of Ohio). Answer was filed by defendants admitting the requirement by them of such separate city license as to Mogadore Reservoir, outside the corporate limits of Akron and in another County, and the plan for similar license requirements as to East Branch Reservoir in Geauga County. Defendants claimed that Section 1501.23, Ohio Revised Code, (now Sec. 1547.61 Revised Code of Ohio) was unconstitutional as being in conflict with Article XVIII, Section 4, Ohio Constitution and as taking property without due process and without compensation.

The basic facts were not in dispute, the issues being made by the allegations and admissions in the pleadings. At the suggestion of the trial court and by agreement of counsel, the matter was submitted upon such issues. The Court dismissed the petition of plaintiff for a permanent injunction as appears in the Entry. A copy of the opinion of the trial court appears in the Appendix holding such statutory provision unconstitutional and void.

Plaintiff filed appeal to the Court of Appeals of Summit County, which affirmed the judgment and proceeding of the Court of Common Pleas. Copy of the Entry of the Court of Appeals appears in the Appendix. The opinion of the Court of Appeals appears in the Appendix, wherein

said section was likewise held unconstitutional. The State appealed. The Supreme Court held that section of the Watercraft Act prohibiting political subdivisions of State from imposing any license fees or other charges on the owners of watercraft for the right or privilege of operating watercraft on wafers owned by such subdivisions does not violate the section of Constitution granting municipalities the right to acquire and own public utilities, or the home-rule amendment of the constitution, and does not deprive the city of property without due process of law.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal raises issues which have not yet been decided by the Supreme Court of the United States and which are of nationwide and far reaching importance.

1. The Supreme Court of Ohio erred in holding that a charge made by a municipality for watercraft using municipality owned waters is not a deprivation of property without due process.

The operation and maintenance by a city, of a system for supplying water to its inhabitants, is a right given by the Ohio Constitution, Article XVIII Section 4, the operation and maintenance of which is proprietary, as distinguished from governmental, *City of Barberton vs. Miksch* 128 O. S. 169 and *State ex rel vs. Hickey* 137 O. S. 475. There is no legal barrier which prevents a city from permitting members of the general public from using boats on its impounded waters when it owns the underlying fee, because, "A municipality, in so far as it acts in a proprietary capacity, possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors." *State ex rel. White vs. City of Cleveland et al.*, 125 O. S. 230, paragraph 1 of Syllabus.

In considering Section 1547:61 Revised Code of Ohio, it is indeed not a charge for the use of the City's property rights, for the reason that the state has no more right to rent or license to others the use of city property than it would have the right to rent, leave or license the right to use any other property which it does not own or has not acquired by law.

To the contrary, the so-called license contemplated by the City does not involve any field occupied by the State, for the reason that the city licensing contemplates only a use charge for municipally owned property, which under no theory of law could the State as a non-owner exact.

Whereas, the license charge imposed by the legislature of the State of Ohio is in the nature of a regulation governing the operation, equipment, enumbering and all other matters relating thereto.

It does not provide for a charge for the use of private waters or municipally owned waters. The charge imposed by the city, does not conflict or invade any field occupied by the State, for the reason that the city licensing or charge contemplates only a use charge for municipally owned property, under no theory of law, could the state as a non-owner exact.

2. The decision of the State Supreme Court is in direct conflict with Section 19 of Article I of the Constitution of the State of Ohio and the Fifth Amendment of the United States Constitution.

The opinion of the Supreme Court of Ohio in deciding that, "The Statutes do not in any way pretend to affect the title or control over such waters. Both the private owner and the political subdivision have the right to say who may or may not use such waters and may charge such fees as they so desire for access thereto and for the use of

ramps or their docks. Such matters are clearly within control of the owner whether private or public. As long as the charge imposed by the political subdivision is not in the nature of a license for the right or privilege of operating watercraft upon its waters, it is valid. It is apparent that there has been no deprivation of property without due process of law by the enactment of the statutes here in question."

The city, as contended in the Courts below has no quarrel with the State of Ohio respecting its right to license and regulate the operation of boats generally, but we do challenge the right of the State to deprive the City of its property rights under the guise of regulations.

The City as owner of the underlying lands and acting in a proprietory capacity, has the right of control over such waters. This right has been recognized by all the Courts below. Thus even though the property was purchased and water impounded with public funds, the public has no right to the use of same in any maner inconsistent with the rules and regulations established under complete control of the City. *State ex rel. White vs. City of Cleveland*, et al., 125 O. S. 230.

Thus it is evident that these waters remained purely private proprietary waters; the City, then, could entirely exclude all watercraft from being operated thereon. *Lambeck vs. Nye* 47 O. S. 336. The City could exclude watercraft on its waters or allow watercraft thereon with or without the payment of a charge.

Prohibiting the municipalities from charging "any License fee or other charge gainst the owner of watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivison." (Section 1547.61 Revised Code of Ohio.) This prohibition wrests from the City, without payment therefor, a valuable right

contrary to the Fifth Amendment to the United States Constitution and Section 19 of Article I of the Ohio Constitution.

3. Municipalities having adopted a charter under 'Home Rule Amendment' exercise under all powers of local self government pertaining to matters of purely local and municapal concern.

The Constitutional grant set forth in Article XVIII Section 3, provides us limitation upon the powers of the municipality in their self government, except that they may not enact local police, sanitary and other similar regulations as are not in conflict with the general laws.

The phrase "as are not in conflict with the general laws" contained in Article XVIII Section 3 of the Constitution, modify the words, "local police, sanitary and other similar regulations" but do not modify the words, "powers of local self government." *State ex rel. Canada vs. Phillips* 168 O. S. 191.

The City clearly recognizes the right of the State to license watercraft, which right is an attribute and function of sovereignty. In no wise has the City attempted to license all watercraft. The City's concern is only when the operator or owner of watercraft is using municipally owned waters, then and only then the City makes a charge for the use of said privilege.

Since there is no question as to the City's right to control its waters, and the right to determine who may or may not use such waters, certainly the right to charge for that right is a matter clearly within the right of local self government.

The City's right to enact such provision to charge for boating on municipally owned waters, did not intend or contemplate that all watercraft in the City of Akron be

licensed or charged, but merely who operated their watercraft on City owned waters.

This in no way could interfere with the States right to license all watercraft being operated in waters in the State of Ohio.

4. Does Section 1547.61 Revised Code of Ohio, deprive the City of property without due process of law.

It is conceded that the City holds property in its proprietary capacity, the Supreme Court in its opinion said, "The statutes do not in any way pretend to affect the title or the control over such waters. Both the private owner and the political subdivision have the right to say who may or may not use such waters and may charge such fees as they so desire for access thereto and for the use of ramps or their docks." *State ex rel. vs. Akron*, 173 O. S. 189 at page 196.

No control of the waters can be affected by the City, when the Court has stated that the City cannot impose any other charge upon operators of watercraft. The Court further stated that the operator of watercraft having obtained a state license needs no other, and further goes on to say that it, the State, in no way requires the owner of private waters or political subdivisions owning waters in their proprietary capacity to permit the use of their waters to anyone; and that it, the State, merley provides that the persons whom they allow to use their waters must have the licenses issued by the State.

Then the "allowance" that the Supreme Court speaks of, but for which the operators could not use City owned waters, can the City make a charge for it?

Does the right to say who may use it and who may not give rise to the municipality to permit one and not another, both having state licenses. Or if City allows one, must they allow all. Can the City at this point charge for allow-

ing operators of watercraft to use City owned waters? Certainly if the City has the right to control, it has the right to charge for granting that allowance, which charge is for the right to use its property and not a license for its watercraft.

The right to boat on its own waters is a property right, the taking of which without compensation is prohibited by the Constitution of Ohio and the United States. The right to use water created by damming is a property right, as are riparian rights, the owner of which cannot be deprived without just compensation. *City of Mansfield vs. Balliett* 65 O. S. 451.

The court of Appeals in declaring portion of section 1547.61 Revised Code of Ohio unconstitutional said, "It appears to the members of this Court that the State and municipal license charges do not overlap, because the State law and the licensing by the City deal with separate and distinct subject matters. The State has not pre-empted the field; and, as a result thereof, the City under Home Rule Amendment of the Constitution, has a right to exact a use fee for boating on its property. The right to charge a use fee comes squarely within the powers of local self government, and does not conflict with State legislation requiring the regulation by licensing watercraft, the revenues from which are used and expended solely under authority of the State."

We, therefore, respectfully submit that the questions presented by this appeal are substantial questions of law, the conclusive answers to which by this Court are of great importance both to the City of Akron, State of Ohio, and the public.

Respectfully submitted,

JAMES V. BARBUTO,
Law Director,
SAL GERMANO,
Assistant Law Director,
Municipal Bldg., Akron 8, Ohio.

APPENDIX A

OPINION OF THE COURT OF COMMON PLEAS

WATTERS, RAY B., Judge

This matter was submitted to the court upon the petition of the plaintiff and the answer of the defendants, which the court will set forth hereinafter in full. There is no substantial dispute as to the facts as will be observed, so the matter becomes a question of law.

Upon suggestion of the court, and agreement of counsel, the request for a temporary injunction was withdrawn and the matter submitted on its merits and upon briefs of counsel.

"Petition" (filed April 14, 1960):

"Now comes Mark McElroy and says he is the duly elected, qualified and acting Attorney General of the State of Ohio, and that he brings this action in his official capacity at the request and on behalf of the Division of Watercraft, Department of Natural Resources, State of Ohio.

"The State of Ohio says that the City of Akron is a municipal corporation organized under the laws of the State of Ohio and is a political subdivision of the State of Ohio; that defendant Leo Berg is Mayor of the City of Akron and defendants Leo G. Walter and Wendell R. LaDue are the Director of Public Service and Superintendent Bureau of Water Supply, respectively, for defendant City of Akron.

"The State of Ohio further says that under Sections 1501.12 etc., Ohio Revised Code, effective January 1, 1960, all watercraft operated on the waters of this State shall be numbered and licensed by the Division of Watercraft, Department of Natural Resources, State

of Ohio; further that Section 1501.23, Ohio Revised Code, provides in part as follows:

> "'-------No political subdivision of this state or conservancy district shall charge any license fee or other charge against the owner of any watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivision or conservancy district and no license or number in addition to those provided for hereunder shall be required by any state department, conservancy district or political subdivision of this state.'

"Plaintiff further alleges that the defendants, in the name of the City of Akron, are issuing and requiring a separate city boat license for the right and privilege of operating watercraft upon Mogadore Reservoir, a body of water constituting waters of the State as defined in Section 1501.12, Ohio Revised Code, and qualifying as water of such City of Akron under Section 1501.23, Ohio Revised Code; and further that defendants threaten to issue and require such separate city boat licenses for operation of watercraft on other Reservoirs of the City of Akron, as well as Mogadore Reservoir, unless restrained by this court; that such action of defendants is illegal and contrary to the provisions of Section 1501.12 et seq., Ohio Revised Code, and the specific provisions of Section 1501.23, Ohio Revised Code.

"The State of Ohio further says that such action of defendants will result in irreparable damage and loss to the State of Ohio for which there is no adequate remedy at law.

"WHEREFORE, Plaintiff prays that the defendants be restrained temporarily from issuance and requirement of separate city boat licenses as herein described, and that on the final hearing of said cause,

that the defendants be enjoined permanently from the issuance and requirement of separate city boat licenses, and for such other and further relief as may be just and proper." (The above was signed by Mark McElroy, Attorney General of Ohio, and Jay C. Flowers, Assistant Attorney General of Ohio.)

"Answer (filed April 22, 1960":

"Now comes the defendant, The City of Akron, together with Leo Be[illegible], Leo G. Walter, and Wendell R. LaDue, impleaded herein, in their respective capacities as Mayor, Director of Public Service, and Superintendent of the Bureau of Water Supply of the said City of Akron, and for their joint answer to the petition of the plaintiff filed herein admit all the allegations of the three paragraphs of the first page of said petition which describe the capacities of the parties, set out the requirement that watercraft operated on the water of this state be numbered and licensed, and quote in part the Text of Section 1501.23, Revised Code of Ohio.

"Further answering, defendants admit that The City of Akron and the several individual defendants acting for the City of Akron are requiring that a permission of license be obtained from the City of Akron for the privilege of operating watercraft upon Mogadore Reservoir, in evidence of which permission or license a numbered metal identification plate of distinctive color is issued to each owner of such watercraft for affixture to such craft.

"Defendants further admit that plans and preparations are being made for issuing similar licenses or permissions for the operation of watercraft upon another water reservoir owned by the City of Akron, namely, East Branch Reservoir, situated in Geauga

County, Ohio, and will continue to do so unless restrained by order of court.

"Further answering, defendants deny each and every allegation of plaintiff's petition not herein specifically admitted to be true.

"Further answering, defendants say that said Mogadore Reservoir is an artificial lake created about 1939 by The City of Akron by damming the waters of a non-navigable stream in the County of Portage, State of Ohio; that said dam was built for the purpose of stabilizing the flow of said stream and to provide an industrial water supply for The City of Akron; that the entire structure of said dam and all of the waters thereby impounded are upon land acquired in fee for water works purposes pursuant to constitutional authority and wholly owned by the City of Akron and used in the operation of the Akron City water works; that said reservoir is at a distance of some miles from and entirely outside of the corporate limits of The City of Akron.

"Defendants further say that the said East Branch Reservoir is situated in Geauga County, Ohio, at a distance of more than 25 miles from The City of Akron and entirely outside of and beyond its corporate limits; that said Reservoir is likewise an artificial body of water created by damming a nonnavigable stream; that all land underlying the structure of said dam and the waters impounded thereby was acquired by The City of Akron for waterworks purposes pursuant to authority granted by the Constitution of the State of Ohio, and is now held in fee by The City of Akron and used in the operation of the Akron City Waterworks.

"Defendants further say that said reservoirs can be made available for public recreational purposes, in-

cluding boating and fishing, only at great additional expense for necessary cleaning and maintenance, and for supervision to protect against pollution, damage to banks and natural growth, and fire in the wooded areas; that because of inhibition contained in the Charter of The City of Akron and in Ohio statute laws, neither water department funds nor tax can be expended for such purposes; that reasonable use fees are necessary to make such use possible; that the so-called license fees charged and planned to be charged by The City of Akron for the operation of watercraft within or without its boundaries and has enacted no ordinance on the subject.

"The defendants further say that said Section 1501.-23, Revised Code, is unconstitutional and void to the extent that it may be understood to prohibit The City of Akron from fixing and imposing license or other charges for the privilege of operating watercraft upon the said reservoirs owned by The City of Akron, for the reason that it results in taking private property without due process and without compensation, and for the further reason that it constitutes a restriction or limitation upon the right granted to The City of Akron by Section 4 of Article XVIII of the Ohio Constitution to acquire, own, lease and operate a public utility.

"Wherefore, having fully answered, defendants pray that plaintiff's petition may be dismissed and that they may go hence with their costs."

(The above was signed by John H. Zerbe, Assistant Director of Law, and Harry N. Van Berg, Director of Law of the City of Akron, attorneys for defendants. The above was sworn to by John H. Zerbe.)

THE LAW (applicable)

The following claim is made by the defendants as questions of law:

"To the extent that R. C. Section 1501.23 prohibits the City of Akron from making charges for the privilege of boating upon or otherwise using its reservoirs, said statute is unconstitutional and void because, 1, it takes private property without due process and without compensation, and, 2, because it restricts and limits the right of the City, under Section 4 of Article XVIII of the Ohio Constitution to own and operate a public utility."

A municipal corporation may own property in either a governmental or proprietary capacity, and that with respect to property held in a proprietary capacity, the rights and liabilities of a municipality *are substantially those of private ownership.*

See State ex rel White versus City of Cleveland, 125 O.S. 230.

In the ownership and operation of water works property, cities act in a proprietary capacity.

See McQuillan, "Municipal Corporations", Section 4, 132 at Page 194.

What is the taking of private property? Generally, it is a deprivation of one or more of the several incidents of ownership; i.e., the right, subject to proper police regulation, to use and control property, to enjoy its fruits, to rent or lease it, and to sell it.

See 32 Ohio Jurisprudence 631, "Incidents of Ownership".

Our Court of Appeals (Summit, 72 Ohio Appeals 93, Hydraulic Company versus Fontaine, et al.,) held:

> "The right to fish and boat upon impounded water (an artificial lake created by impounding a small stream) is a right which attaches to the owners of the underlying fee-----".

There is no ownership in the water itself, which eventually flows away; but the owner of the land underlying the water so dammed, has the exclusive right and use of the water so dammed, *and the public has no right to fish in a boat upon its waters. Such right is an incident of the private ownership thereof.*

This case followed the rule laid down in Lembeck versus Nye, 47 O.S. 336, which determined the ownership and rights in Chippewa Lake, Medina County, a 400 acre natural non-navigable inland lake (see syllabus (1) a).

To the same effect, see the ruling concerning the ownership of Bass Lake in Geauga County in the case of Bass Lake Company versus Hollenbeck, et al, 11 O.C.C. 508; also see 24 Ohio Jurisprudence (2nd) Fish and Game Section (8).

The situation now before us is parallel in fact and principle to the case of Board of Education versus City of Columbus, 118 O.S. 295, in which the Supreme Court of Ohio resolved the long dispute concerning the right of cities to charge, contrary to state statute (G.C. 3963), now R.C. 743.09, for water supplied to schools.

"Syllabus (1): That portion of Section 3963, G.C., which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of a public school building or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section (4) of Article XVIII of the Ohio Constitution, and is unconstitutional and void." (East Cleveland versus Board of Education, 112 O.S., 607, overruled.)

"Syllabus (2): That portion of Section 3963 G.C. above referred to is unconstitutional and void for the further reason that it results in taking of private property for

public use without compensation therefore in violation of Section 19, Article I of the Ohio Constitution."

"Syllabus (3): Municipalities derive the right to acquire, construct, own, lease and operate utilities, the product of which is to be supplied to the municipalities, or its inhabitants, from Section (4), Article XVIII of the Constitution, and the Legislature is without power to impose restrictions or limitations upon that right."

(Euclid versus Camp Wise Association, 102 O.S. 207, approved and followed.)

This case was approved and followed in Swank versus Village of Shiloh, 166 O.S. 415.

See also State ex rel, versus City of Defiance, 167 O.S. 313 concerning G.C. 3667, now R.C. 743.13.

CONCLUSION

It, therefore, becomes obvious that the so-called Watercraft Act (Section 1501.12, et seq. Revised Code) is unconstitutional and void insofar as it attempts to prohibit municipalities from imposing charges for the privilege of operating watercraft upon their waterworks reservoirs.

Furthermore, although the question of the applicability of said Watercraft Statute to other private individual or corporate owners of similar impounded lakes upon non-navigable streams is not actually before the court in this action, from the authorities cited above, it would seem that said statute would be, likewise, unconstitutional as to said owners, as it likewise attempts to deprive them of private personal property rights in said waters without due process of law and without compensation therefor.

On this matter the court refers to Lembeck versus Nye, 47 O.S. 336, Syllabus (1) (Supra), the so-called Chippewa Lake Case.

See also Syllabus (1)-a thereof, and 24 Ohio Jurisprudence 2nd, Fish and Game, Section (8); and also Hydraulic Company versus Fontaine 72 Appellate 93 (Summit County) supra, and other authorities in the brief of Attorney Clarence W. May of Akron, appearing Amicus Curiae, with consent of the Court.

Council will prepare the proper entry, with exceptions.

Attorney General Mark McElroy, Assistant Attorney General Jay C. Flowers, for Plaintiff;

Harry N. VanBerg, Law Director of City of Akron; John H. Zerbe, Assistant Law Director for City of Akron, for Defendants;

Clarence W. May, Attorney, Akron, Ohio, on the Brief as Amicus Curiae.

APPENDIX B

ORDER OF THE COURT OF COMMON PLEAS

This cause came on to be heard upon the petition of the plaintiff for temporary and permanent injunctions, the answer of the defendant, the statements of counsel, and the briefs of the parties and amicus curiae, and was submitted to the court.

The Court, upon consideration, finds upon the issues joined in favor of the defendants and against the plaintiff.

Wherefore, it is the order and judgment of the Court that the petition of the plaintiff be dismissed at plaintiff's costs.

Exceptions to plaintiff.

S/ Ray B. Watters, Judge

APPENDIX C

OPINION OF THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT OF OHIO

DOYLE, J.

This action was commenced in the Court of Common Pleas of Summit County by the Attorney General of Ohio, at the request and on behalf of the Division of Watercraft, Department of Natural Resources, of the State of Ohio, against the City of Akron, Ohio, and certain of its various officials, to enjoin them from requiring of the general public separate city boat licenses for the use of their boats on the Mogadore Reservoir.

It was charged that the specially named city officials, in the name of the City of Akron, "are issuing and requiring a separate city boat license for the right and privilege of operating watercraft upon Mogadore Reservoir, a body of water constituting waters of the state as defined in Sec. 1501.12, Ohio Revised Code, and qualifying as waters of such City of Akron under Section 1501.23, Ohio Revised Code; and further that defendants threaten to issue and require such separate city boat licenses for operation of watercraft on other reservoirs of the City of Akron, as well as Mogadore Reservoir, unless restrained by this court; that such action of defendants is illegal and contrary to the provisions of Section 1501.12, et seq., Ohio Revised Code, and the specific provisions of Section 1501.23, Ohio Revised Code."

The petition further stated that;

> "-----under Sections 1501.12, etc., Ohio Revised Code, effective January 1, 1960, all watercraft operated on the waters of this state shall be numbered and licensed by the Division of Watercraft, Department of Natural Resources, State of Ohio; further that Section 1501.23, Ohio Revised Code, provides in part as follows:

"'-----No political subdivision of this state or conservancy district shall charge any license fee or other charge against the owner of any watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivision or conservancy district and no license or number in addition to those provided for hereunder shall be required by any state department, conservancy district or political subdivision of this state.'"

The trial court, upon hearing, found, upon the issues joined, in favor of the defendants and dismissed the plaintiff's petition. The appeal to this court on questions of law followed in due course.

In view of the fact that neither a bill of exceptions nor a stipulation of fact is properly before us, it becomes necessary to set out in detail the uncontroverted admissions and allegations in the answer which we hold sufficient to supply the evidence for a decision on the issues created in the pleadings.

The defendants, by answer, after admitting the capacity of the plaintiff to bring the action and the provisions of Sec. 1501.23, R.C., as pleaded in the petition, further admitted that:

"2.-----the City of Akron and the several individual defendants acting for the City of Akron are requiring that a permission or license be obtained from the City of Akron for the privilege of operating watercraft upon Mogadore Reservoir, in evidence of which permission or license a numbered metal identification plate of distinctive color is issued to each owner of such watercraft for affixture to such craft."

The defendants further admitted in the pleading:

"3.-----that plans and preparations are being made for issuing similar licenses or permissions for the operation of watercraft upon another water reservoir owned by the City of Akron—namely, East Branch Reservoir

—situated in Geauga County, Ohio, and will continue to do so unless restrained by order of court."

The answer continued:

"5. Further answering, defendants say that said Mogadore Reservoir is an artificial lake created about 1939 by the City of Akron by damming the waters of a nonnavigable stream in the County of Portage, State of Ohio; that said dam was built for the purpose of stabilizing the flow of said stream and to provide an industrial water supply for the City of Akron; that the entire structure of said dam and all of the waters thereby impounded are upon land acquired in fee for water works purposes pursuant to constitutional authority and wholly owned by the City of Akron and used in the operation of the Akron City water works; that said reservoir is at a distance of some miles from and entirely outside of the corporate limits of the City of Akron.

"6. Defendants further say that the said East Branch Reservoir is situated in Geauga County, Ohio, at a distance of more than 25 miles from the City of Akron and entirely outside of and beyond its corporate limits; that said reservoir is likewise an artificial body of water, created by damming a nonnavigable stream; that all land underlying the structure of said dam and the waters impounded thereby were acquired by the City of Akron for water works purposes pursuant to authority granted by the constitution of the State of Ohio, and are now held in fee by the City of Akron and used in the operation of the Akron City waterworks.

"7. Defendants further say that said reservoirs can be made available for public recreational purposes, including boating and fishing, only at great additional expense for necessary cleaning and maintenance, and for supervision to protect against pollution, damage to banks and natural growth, and fire in the wooded areas; that because of inhibition contained in the charter of the City of Akron and in Ohio statute law, neither water department funds nor tax (funds) can be expended for such purposes; that reasonable use fees are necessary to make such use possible; that the so-

called license fees charged and planned to be charged by the City of Akron for the operation of watercraft upon the said reservoirs are merely use charges imposed by the City of Akron as owner for the right to operate watercraft upon reservoirs so owned by the City of Akron in its proprietary capacity; that the license plates so issued by the City of Akron are issued solely to identify the craft for which a season's use fee has been paid in advance for permission to operate on such property owned by the City of Akron; that such permissions are not intended to constitute a governmental licensing or regulation of the operation of watercraft; that the City of Akron does not in its governmental capacity license or regulate the operation of watercraft within or without its boundaries and has enacted no ordinance on the subject.

"8. The defendants further say that said Section 1501.23, Revised Code, is unconstitutional and void to the extent that it may be understood to prohibit the City of Akron from fixing and imposing license or other charges for the privilege of operating watercraft upon the said reservoirs being owned by the City of Akron, for the reason that it results in taking private property without due process and without compensation, and for the further reason that it constitutes a restriction or limitation upon the right granted to the City of Akron by Section 4 of Article XVIII of the Ohio constitution to acquire, own, lease and operate a public utility.

"9. Wherefore, having fully answered, defendants pray that plaintiff's petition be dismissed and that they may go hence with their costs."

We first direct attention to the assignment of errors which claim that the Court erred "2. In holding Section 1501.12, et seq., Ohio Revised Code, unconstitutional and void as being in conflict with Article XVIII, Section 4, of the Ohio constitution," and "3. In holding Section 1501.23, Ohio Revised Code, prohibiting municipalities from charging any additional license fee or other charge for the privilege of operating watercraft upon their waterworks reservoirs, as

unconstitutional, null and void, as being in conflict with Article XVIII, Section 4, of the Ohio constitution."

1. Article XVIII, Sec. 4, of the Ohio constitution provides:

> "Any municipality may acquire, construct, own, lease and operate *within or without* its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility." (Underscoring ours.)

This provision is a delegation of power to a municipality directly from the people of the state. It is self-executing and requires no enabling legislation to complete the grant of power. Any legislation relative to this grant of power must be confined to regulatory measures, and any attempt by the legislature to impose conditions upon the grant must be held ineffective. See opinion of Marshall, C.J., in City of East Cleveland v. Board of Education, etc., 112 O.S. 607, at p. 619. Also: Board of Education, etc., v. City of Columbus, 118 O.S. 295.

When a city (as was done in the instant case) undertakes to construct and maintain a system for supplying water to its inhabitants, it acts in a proprietary capacity and may be held liable for its torts in the operation of its system. City of Barberton v. Miksch, 128 O.S. 169.

A municipal corporation has the right to acquire bottom land, dam a stream flowing into it, and impound water therein, for the purpose of creating and maintaining a system to supply water to its inhabitants, as was done by the City of Barberton in City of Barberton v. Miksch,

supra. See: Moody & Thomas Milling Co. v. City of Akron, 93 O.S. 484; Cleveland-Akron Bag Co. v. City of Akron, 93 O.S. 496; and Board of Education, etc., v. City of Columbus, 118 O.S. 295.

2. Returning to the constitution of Ohio, we find, in Article XVIII, Sec. 3, the following grant of power from the people of the state:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

In 38 O. Jur. 2d, Municipal Corporations, Sec. 75, appears the following well-stated reasons for this constitutional provision, with supporting authorities, to which reference is made:

> "A steadily increasing tendency of state legislatures to interfere in the purely local affairs of municipalities led to a general desire that the latter should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise. Some governmental regulations interest and concern only the people of municipalities by reason of peculiar social problems arising out of their closer community life. The temptations, the vices, the habits, the sentiments, the modes and manners of living, the menaces to health and safety peculiar to municipal life, call for more regulation and a different character of regulations than that found sufficient for the sparsely settled communities. It is equally apparent that the problems of the village are essentially different from the problems of the metropolitan center. It was in recognition of these truths that the convention of 1912 drew article 18 of the Ohio Constitution, granting to municipalities the exercise of all powers of local self-government, except that, in the adoption and enforcement within municipal limits of local police, sanitary, and other similar regulations, there must be no conflict with general laws.

"The Home Rule Amendment to the Ohio Constitution was the outcome of a precarious political situation. Prior to 1912, there was no express delegation of power to municipalities in the organic law of this state. Municipal corporations were held to possess only such powers as were expressly granted by statute, and such as might be implied as essential to carry into effect those which were expressly granted. Their right to control their own local affairs rested wholly on the general grant of powers by the General Assembly of the state. Consequently, the municipalities appealed to the constitutional convention of 1912 and the Home Rule Amendment was finally incorporated in the Ohio Constitution. The manifest purpose of the Home Rule Amendment in 1912 was to add to the governmental status of the municipalities. The people made a new distribution of governmental power.-------"

3. In the case before us, the fact is evident that the City of Akron not only has the undisputed right to the impounded water for the use of the municipality or its inhabitants, but also has full title to the land under the impounded water, and as such owner, has the exclusive right to use the water for boating and fishing. The city, as the owner in fee of the land over which the water is impounded, may refuse the use of the water for boating or fishing by the public, as could any other owner. On the other hand, it can give this right, as an owner, to others. See: Akron Canal & Hydraulic Co. v. Fontaine, et al., 72 O. App. 93.

Having the right to refuse or give the right to members of the public, if it elects to permit the public to boat on the waters, can it be denied the right to charge a fee for such use of its own property because the state legislature has so declared?

4. As noted heretofore, the state legislature has enacted Sec. 1501.23, R.C., in which it has prohibited the City of Akron, as well as any other City in the state, from charging

"any license fee or other charge against the owner of any watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivision------."

The legislature also requires, in Sec. 1501.15, R.C., that:

> "Every watercraft operated on the waters of this state shall be numbered. No person shall operate or give permission for the operation of any watercraft on such waters unless the watercraft is numbered in accordance with a federally approved numbering system of this or another state, and unless (A) the certificate of number awarded to said watercraft is in full force and effect, and (B) the identifying number set forth in the certificate of number is displayed on each side of the bow of such watercraft."

Legislation further prescribes, in Sec. 1501.18, R.C., for "procedure for reimbursement to political subdivisions and agencies" of a percentage of the monies collected by the state; and, in Sec. 1501.23, R.C., it is provided that no other registration shall be permitted, but that local rules and procedures may be adopted.

In this legislation, it is quite obvious that the state has in effect said that, before the city gives permission to anyone to operate any watercraft on its waters, it must see that the operator thereof has complied with the state licensing laws. It has further said that the city-owner cannot charge for the use of its property when, and if, it determines to allow the members of the public to operate boats thereon.

The City of Akron states its position as follows:

> "The city------has no quarrel with the state of Ohio respecting its right to license and regulate the operation of boats generally, but we do challenge the right of the state to deprive the city of its property rights under the guise of regulation."

In view of the stand of the city, *we will not rule on the right of the state to* regulate by license or otherwise all boating on the waters of the state, as defined by statute, whether the underlying land is owned privately or otherwise, but will confine our decision to the claim of the city, as noted above.

Has the state government occupied the entire field under investigation, and if it has, can it rightfully do so?

As heretofore observed, the operation and maintenance, by a city, of a system for supplying water to its inhabitants, is a right given by the Ohio constitution, the operation and maintenance of which is proprietary, as distinguished from governmental. There is no legal barrier which prevents a city from permitting members of the general public from using boats on its impounded water when it owns the underlying fee, because "A municipality, in so far as it acts in a proprietary capacity, possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors." State, ex rel. White v. City of Cleveland, et al., 125 O.S. 230, par. 1 of syllabus.

In our consideration of the statutory state license charge, we are not necessarily concerned with its legal nature, but, whatever it may be termed, it indeed is not a charge for the use of the city's property rights, for the reason that the state has no more right to rent or license to others the use of city property than it would have the right to rent, lease or license the right to use any other property which it does not own or has not acquired by law. To the contrary, the so-called license contemplated by the city does not invade any field occupied by the state, for the reason that the city licensing contemplates only a use charge for municipally-owned property—which, under no theory of law, could the state as a nonowner exact.

It appears to the members of this court that the state and municipal license charges do not overlap, because the state law and the licensing by the city deal with separate and distinct subject matters. The state has not preempted the field, and, as a result thereof, the city, under the Home Rule Amendment of the constitution, has the right to exact a use fee for boating on its property. The right to charge a use fee comes squarely within the powers of local self-government, and does not conflict with state legislation requiring the regulation by licensing of watercraft, the revenues from which are used and expended solely under the authority of the state.

The part of Sec. 1501.23, R.C., which prohibits the city from charging "any license fee or *other charge* against the owner of any watercraft for the right or privilege of operating---------watercraft" upon the waters of the city, when the city owns the underlying fee, we hold to be an unconstitutional act of authority. (Underscoring ours.)

The judgment entered in the Court of Common Pleas, dismissing the petition of the plaintiff (appellant in this court), will be affirmed; first, because the City's license charge for the use of its property falls within the powers of local self-government, and is not in conflict with general laws of the state; and, second, the controversial part of Sec. 1501.23, R.C., wrests from the city, without payment therefore, a valuable right of property, and to that extent is unconstitutional and void.

We find no error of a prejudicial character in the judgment dismissing the petition of the plaintiff below.

Judgment affirmed.

Stevens, P. J., and Hunsicker, J., concur.

APPENDIX D

ORDER OF THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT OF OHIO

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Notice of Appeal on questions of law of the said Appellant herein, together with a transcript of the docket or journal entries of the Court of Common Pleas of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said cause, wherein State of Ohio, ex rel., Mark McElroy, Attorney General, Plaintiff, and City of Akron, et al., Defendants, mentioned and referred to in said Notice of Appeal, was argued by counsel:

Upon consideration whereof, the Court finds that there is no error manifest upon the face of the record in said orders and judgment of said County of Common Pleas, and in its opinion, substantial justice has been done to the party complaining, as shown by the record of the proceedings, and the judgment under review.

It is thereupon considered, ordered and adjudged by this Court, that the judgment and proceeding of the said Court of Common Pleas, in said cause in favor of the said Appellees and against the said Appellant be, and the same are hereby, in all things affirmed; there being however, in the opinion of the Court, reasonable ground for this proceeding.

It is further considered and ordered, that the Appellant pay the costs of this proceeding, taxed at $....., and in default thereof, that execution issue therefor.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Summit County, to carry this Judgment into execution. Appellant excepts.

Approved

Stevens

Presiding Judge

APPENDIX E

OPINION OF THE SUPREME COURT OF OHIO

RADCLIFF, J.

The basic question raised by this appeal is the validity of Section 1547.61, Revised Code, prohibiting political subdivisions of this State from imposing any license fees or other charges on the owners of watercraft for the right or privilege of operating the watercraft upon waters owned by such subdivisions.

The ultimate issue is the right of a political subdivision to require a license or to impose some other charge in the nature of a license fee for the privilege of operating watercraft on waters owned by the political subdivision.

The Ohio Watercraft Act provides in essence, so far as licensing is concerned, that watercraft operated on waters of this state must have state licenses. The pertinent parts of this act with which we are directly concerned in the present case are as follows:

Section 1547.01 (I), Revised Code, defines waters of this state as follows:

> "'Waters of this state' means all streams, lakes, ponds, marshes, watercourses, waterways, springs, irrigation systems, drainage systems, and all other bodies of water, surface or underground, natural or artificial, which are situated wholly or partially within this state or within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface water."

The provision of Section 1547.61, Revised Code, here involved, reads as follows:

> "No political subdivision of this state or conservancy district shall charge any license fee or other charge against the owner of any watercraft for the right or privilege of operating said watercraft upon the waters of any such political subdivision or conservancy dis-

trict and no license or number in addition to those provided for hereunder shall be required by any state department, conservancy district, or political subdivision of this state."

There is no question that the waters owned by the municipality in this case fall within the definition of "waters of this state." It is the contention of the municipality that the prohibition of licensing by the municipality violates the home-rule amendment, Section 3, Article XVIII of the Ohio Constitution, Section 4 of such article granting municipalities the right to acquire and own public utilities, and deprives the municipality of property without due process of law.

We will turn our attention first to the power of the state to require a state license on waters of this state as defined in Section 1547.01 (I), Revised Code. It should be noted at the outset that, although the definition of "waters of this state" includes private as well as public impoundments and would require a state license for the operation of watercraft thereon, whether public or private, the prohibition as to the imposition of a license or other charge extends only to political subdivisions or conservancy districts, in other words, to waters which although held in a proprietary capacity are held by arms or agencies of the state.

The right of the state to extend its control in this matter must be based on the police power for the preservation of public safety or welfare.

The power of the state to enact the present section under consideration may well be based on both of these branches of the police power.

First, due to the increasing tendency to shorten the work week, there is a consequent increase in the amount of leisure time, and public recreation and public recreational facilities

have become a matter of statewide concern which definitely relates to the public welfare.

Second, it is a well known fact that there are certain inherent dangers in the operation of watercraft irrespective of whether such watercraft are operated on public or private waters, and the dangers incident to such operation have created a necessity for uniform safety regulations. The question is whether such use is so general as to require intervention by the state.

Due to our changing society, many things which were once considered a matter of purely local concern and subject strictly to local regulation, if any, have now become a matter of statewide concern, creating the necessity for statewide control.

Thus it is with the use of boats for recreational purposes. At one time, not in the too distant past, few persons owned their own boats, and those who did customarily docked them in a single impoundment. However, the nature of the use and ownership of boats has changed completely over the last several years. Where once boat ownership was limited to the very few, today it has become common place. Where once there were comparatively few bodies of water where one could operate a boat, today, as a result of the state conservation programs and the creation of artificial lakes by municipalities for the purpose of water supply, there are a multitude. Where once the few boats owned by individuals were operated in a single place, today, as a result of the development of the boat trailer resulting in making the boat mobile on land and thus greatly increasing the number of places where the boat may be operated, such operation has become statewide.

A summary of the boat and motor license sales for Ohio well exemplifies the increased use and ownership of boats

for recreational purposes. In 1950, the total number of licenses sold for the various types of boats and motors was 37,958; in 1958 this had increased to 98,696, or about two and one-half times. Without a complete breakdown of these figures, boat ownership alone grew from 16,768, in 1950, to 40,350, in 1958, for about the same ratio. Statistics issued by the Outboard Boating Club of America show that so far as national use is concerned recreational boat ownership grew from 2,440,000, in 1947, to 8,025,000, in 1960. The same statistics show that the sales of boat trailers increased from 3,790, in 1947, to 168,000, in 1958. When these facts are considered together with the fact that the water area in Ohio increased from 56 square miles, in 1932, to 156 square miles in 1961, as a result of the creation of new facilities, it is self-evident that boat licensing has become a matter of statewide concern.

Where the use of property becomes statewide, local regulations in the nature of licensing in respect thereto are a harassment to the general public, accompanying this then is the need for a uniform standard of safety regulations, and such matters are the subject of statewide concern requiring uniform and general regulation by the state.

Clearly, under this situation we have a matter subject to the state police power, and the licensing and regulation in respect thereto constitute a valid exercise of such power.

Having determined that the requirement of a state license consitutes a valid exercise of the police power, we come now to a consideration of the validity of the provision prohibiting the issuance of a license or the making of any other charge by a political subdivision for the use of its reservoirs and lakes. The inclusion of the prohibition against any other charge is, of course, for the purpose of preventing the subdivision from imposing a license fee under some other guise.

The city attacks this prohibition under three theories. First, it attacks this provision on the basis of its alleged rights under Section 4 of Article XVIII of the Constitution, which provides as follows:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

The city cites in support of its contention *Board of Education of City School District of Columbus v. City of Columbus*, 118 Ohio St., 295; *Swank v. Village of Shiloh*, 166 Ohio St., 415; and *State, ex rel. McCann v. City of Defiance*, 167 Ohio St., 313.

An examination of those cases shows, however, that they pertain to the operation of public utilities, therefore none of those cases are pertinent to the question presently before us.

The use of the property here in question is clearly a nonutility use or purpose. The fact that the use is made on utility property does not in any way convert the use from nonutility to utility. The constitutional authorization for utilities does not extend its cloak of protection to the use of utility property for recreational purposes. The city gains no rights or powers in this matter from the constitutional provisions or its cited cases.

Second, the city contends it has the right to impose a license tax because of its powers under Section 3, Article

XVIII of the Constitution (the home-rule amendment), which reads as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The home-rule amendment extends powers to municipalities as to matters which are purely of local concern, it does not invest exclusive powers in the municipalities, and the police power, by the terms of the Constitution, is limited to those regulations which do not conflict with the general law. Once a matter has become of such general interest that it is necessary to make it subject to statewide control so as to require uniform statewide regulation, the municipality can no longer legislate in the field so as to conflict with the state. It must be remembered that a city is an agency (some prefer stepchild) of the state. As we have indicated the use of boats for recreational purposes has so expanded that local licensing would place an undue burden and constitute an unwarranted harrassment of those of the general public who wish to enjoy the recreation of boating and would ofttimes require the purchase of a season's license for a single use of a lake.

Does the fact that the state has entered this field constitute a pre-emption thereof?

To determine this we must consider the nature of the licenses exacted both by the state and by the municipality. Do they constitute purely regulatory measures or are they actually for the production of revenue so as to constitute a tax? So far as municipalities are concerned, since they urge the need of the money for maintenance purposes, such licenses clearly are a tax. To realize that the state license here involved is an excise tax, the lion's share of which is returned to the political subdivisions, requires only a con-

sideration of the fact that under Section 1501.18, Revised Code (now Section 1547.56, Revised Code), all money received by the state for these licenses, except for administrative expenses, is returned to the subdivisions. Under this section, as long as the funds are available, the subdivisions are guaranteed a minimum of 90 per cent of the amount collected by them under their own municipal licenses in 1959. Financially the municipalities are not substantially hurt.

We having determined the facts that the state license constitutes an excise tax, and that the state properly entered the field, it necessarily follows that the state has pre-empted the field, and municipalities can no longer levy a license tax on watercraft. *Haefner, a Taxpayer v. City of Youngstown*, 147 Ohio St., 58.

Third, the city urges that it holds the property involved in its proprietary capacity, and that the state is depriving it of property without due process of law. It is the old cry, "I can do with my property as I see fit." This feudal theory of law has long been buried. All property is held subservient to the police power under the tacit condition that where it is necessary the property and its use may be regulated to promote the public safety and welfare. 10 Ohio Jurisprudence (2nd), 465, Constitutional Law, Section 387. In the present case, the state has determined in the interest of public safety and welfare that it is necessary that the licensing of watercraft both on public and private impoundments of water be controlled by the state; that anyone who operates watercraft on waters of this state must procure a license from the state and having procured the state license needs no other; that such license invests the holder with no right to operate his boat on other than waters of the state; that it in no way requires the owner of private waters or political subdivisions owning waters in their proprietary

capacity to permit the use of their waters by anyone; and that it merely provides that the persons whom they allow to use their waters must have the licenses issued by the state.

The statutes do not in any way pretend to affect the title or the control over such waters. Both the private owner and the political subdivision have the right to say who may or may not use such waters and may charge such fees as they do desire for access thereto and for the use of ramps or their docks. Such matters are clearly within control of the owner whether private or public. As long as the charge imposed by the political subdivision is not in the nature of a license for the right or privilege of operating watercraft upon its waters, it is valid. It is apparent that there has been no deprivation of property without due process of law by the enactment of the statutes here in question.

It must be concluded that the enactment of Section 1547.61, Revised Code, constitutes a valid exercise of the police power and by the enactment of such section the state has pre-empted the authority to license watercraft whether such watercraft is operated on public or private waters.

The judgment of the Court of Appeals is, therefore, reversed, and final judgment is entered for the appellant.

Judgment reversed.

Matthias, Bell and O'Neill, JJ., concur.
Weygandt, C. J., Zimmerman and Taft, JJ., dissent.
Radcliff, J., of the Fourth Appellate District, sitting by designation in the place and stead of Herbert, J.
Taft, J., dissents because, as stated in the opinion in the Court of Appeals by Doyle, J., "the so-called license contemplated by the city does not invade any field occupied by the state, for the reason that the city licensing contemplates only a use charge for municipally-owned property—which, under no theory of law, could the state as a nonowner exact."
Zimmerman, J., concurs in the foregoing dissenting opinion.

APPENDIX F

ORDER OF THE SUPREME COURT OF OHIO

This cause, here on appeal from the Court of Appeals from Summit County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered that final judgment is entered for the appellant.

It is ordered and adjudged also that appellant recover from appellees costs expended in this Court, the Court of Appeals and Common Pleas Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

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No. 327

IN THE

Supreme Court of the United States

October Term, 1961

CITY OF AKRON, ET AL.,

Appellant,

vs.

THE STATE OF OHIO, EX REL., MARK McELROY, ATTORNEY GENERAL,

Appellee.

MOTION TO DISMISS APPEAL

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Other Authorities Cited

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 edition) Section 20 4
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11 Ohio Jurisprudence (2d) Constitutional Law Section 698 7
54 American Jurisprudence 801, United States Courts, Section 171 9

IN THE

Supreme Court of the United States

October Term, 1961

No. 327

CITY OF AKRON, ET AL.,

Appellant,

vs.

THE STATE OF OHIO, EX REL., MARK McELROY, ATTORNEY GENERAL,

Appellee.

MOTION TO DISMISS APPEAL

Comes now the State of Ohio, the Appellee herein, by its duly elected Attorney General, and moves this Court to dismiss with costs the appeal taken herein to this Court by City of Akron, upon the following grounds:

1. There is no federal question involved.

2. The federal question sought to be reviewed was not timely or properly raised.

3. The decree of the Supreme Court of Ohio did not expressly pass on the claimed federal question.

4. The decree of the Supreme Court of Ohio rests on adequate non-federal basis.

5. The appeal is not taken in conformity to the rules of this Court, Rule 15, Section (d).

STATEMENT

This motion to dismiss the appeal is filed in accordance with Rule 16 of the Rules of the Supreme Court of the United States and in response to the jurisdictional statement filed by appellant and received by appellee on August 13, 1962.

ARGUMENT.

1. There is no federal question involved.

Appellant has specified as its first basis of appeal and question presented the claimed conflict of Section 1547.61 of the Ohio Revised Code with the due process clause of the 5th Amendment of the United States. (Notice of Appeal, 3A and Jurisdictional Statement, page 2) The Fifth Amendment is not applicable to, or restrictive of, state legislation. *Withers v. Buckley*, 20 How. (61 U.S.) 84, 15 L.Ed. 816. The Fifth Amendment applies to the United States only, and not to laws or proceedings under the authority of a state. *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 46 L.Ed. 171, 22 S.C.R. 120; *Winous Point Shooting Club v. Caspersen*, 193 U.S. 189, 48 L.Ed. 675, 24 S.C.R. 431. The latter case held as follows:

> "No Federal question which will confer jurisdiction of the Supreme Court of the United States of a writ of error to a state court is involved in a contention in the highest court that, by the judgment of the trial court, private property is taken for public use without just compensation, in violation of the 5th Amendment to the Federal Constitution, since this amendment operates solely as a restriction upon Federal powers, and not upon those of the several states."

An allegation in the record based upon the due process clause of the Fifth Amendment will not support an argument in the Supreme Court based upon the due process clause of the Fourteenth Amendment. *Chapin v. Frye*, 179 U.S. 127, 129-130.

As hereafter indicated, it is the position of appellee that the due process clause of the Ohio Constitution *only* was presented to and passed upon by the Ohio Supreme Court.

Irrespective, no federal question has been assigned nor should be considered upon this claimed basis for review:

> "The Supreme Court, upon an appeal from a state court, will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the state court."

Flournoy v. Wiener, 321 U.S. 253, 88 L.Ed. 708, 64 S.C.R. 548 (1944).

It is further submitted that appellant can not justify this deficiency on the basis of improvidence. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 edition) Section 20, at page 45 reads as follows:

> "• • • In considering the statement as to jurisdiction upon appeal, filed under Rule 12, the Supreme Court inquires not merely whether the case is reviewable on appeal as distinguished from certiorari, but whether a defect to review by either mode exists. If such a defect does exist, 28 U.S.C. Sect. 2103 has no application and the appeal is summarily dismissed without considering the appeal papers as a petition for certiorari." (Citing *Flournoy v. Wiener*, supra)

The second basis of appeal presented by appellant (Notice of Appeal 3B and Question 2, Jurisdictional Statement p. 2) questions the validity of this state statute under the provision of a state constitution, namely the homerule amendment of the Ohio Constitution, Article 18, Section 3. With questions whether the state statute is invalid under the state constitution, the Supreme Court will have nothing to do in reviewing state court decisions. *Montana ex rel. v. Rice*, 204 U.S. 291; *Smith v. Jennings*, 206 U.S. 276; *Southwestern Oil v. Texas*, 217 U.S. 114, 118-119; *Brown-Forman v. Kentucky*, 217 U.S. 563. Moreover, it is well settled in this court that it must be made to appear that some provi-

sion of the federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth. *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273.

Where question presented below was validity of statute under state Constitution it could not be urged in the Supreme Court that the statute was violative of the federal Constitution: *Gibbes v. Zimmerman*, 290 U.S. 326, 78 L.Ed. 342, 54 S.C.R. 140.

The third basis for appeal presented by appellant (Notice of Appeal 3B and Question 3, Jurisdictional Statement page 2) is ambiguous, but certainly neither specifies nor presents a federal question under the United States Constitution. For the foregoing reasons, it is submitted that no federal question is involved.

2. The federal question sought to be reviewed was not timely or properly raised.

As specified in branch 1 of the motion herein, no federal question is presented. Furthermore, any claim under the Federal Constitution, and that is specified as the Fifth Amendment, is raised for the first time in the Notice of Appeal and the Jurisdictional Statement filed herein. The Court will note no reference to the U. S. Constitution or federal questions in the opinion of the Supreme Court of Ohio. (Appendix E, pages 33-40, inclusive of the Jurisdictional Statement)

It is too late to raise the federal question for the first time in the Notice of Appeal to the Supreme Court or in the Jurisdictional Statement. Such papers are not part of the record of the state court proceedings and it is that record which must affirmatively show a raising of the federal issue. *White River Lumber Co. v. Arkansas*, 279 U.S. 692, 700, 73 L.Ed. 903, 49 S.C.R. 457; *Hiawassee River Power*

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Co. v. Carolina-Tennessee Power Co., 252 U.S. 341, 344, 64 L.Ed. 601, 40 S.C.R. 330.

Nor has such a question been properly raised. At most, the broad claim of "without due process and without compensation" was advanced in the answer of appellant before the trial court and a general discussion of due process by the Supreme Court of Ohio in its opinion without reference to a federal question. As will be discussed in item 3 herein, such is referable only to the due process provisions of the Ohio Constitution, one of which (Article 1, Section 19) is detailed by Appellant at page 4 of the Jurisdictional Statement. In any event, such a claimed federal question must be properly raised. A contention that certain instructions to the jury in a criminal case in effect deprived the accused of his liberty without due process of law does not, of itself, raise a federal question under the U. S. Constitution, 14th Amendment, with sufficient distinctness to sustain a writ of error from the Federal Supreme Court to a state court. *Thomas v. State of Iowa*, 209 U.S. 258. The Court, in its opinion, at page 263, stated as follows:

> "* * * A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution. See Clarke v. McDade, 165 U.S. 168, 172, 41 L.ed. 673, 17 Sup. Ct. Rep. 284; Miller v. Cornwall R. Co., 168 U.S. 131, 134, 42 L.Ed. 409, 410, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U.S. 78, 88, 49 L.ed. 394, 397, 25 Sup. Ct. Rep. 176."

3. The decree of the Supreme Court of Ohio did not expressly pass on the claimed federal question.

As indicated, general reference to "due process" by appellant and the Supreme Court of Ohio, in absence of specific reference to the United States Constitution, must be

considered in the light of state constitutional provisions. Ohio has such provisions, one of which has been specifically recited and relied upon by appellant.

Article I, Section 19 of the Ohio Constitution provides as follows:

> "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Article I, Section 16 of the Ohio Constitution provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
> "(Suits against the state.) Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

These provisions have been interpreted by the Ohio courts as equivalent to the "due process" provisions of the Federal Constitution. 11 Ohio Jurisprudence (2d) pages 49-50, Constitutional Law, Section 698, reads as follows:

> "The provisions of the Federal Constitution refer to 'due process of law'; whereas the Constitution of this state uses the phrase 'due course of law.' 'Due course of law' is equivalent in meaning to 'due process of law,' or as expressed by the Supreme Court in an early case, they are 'one and the same thing.' Thus there is no difference respecting due process of law in the Constitutions of the United States and of Ohio. The due

course of law provision of Section 16 article I of the Ohio Constitution has been considered equivalent to the due process of law clause in the Fourteenth Amendment to the Federal Constitution. The clause in the Federal Constitution imposes no limitations upon the legislative power of the General Assembly of this state that is not imposed by its Bill of Rights. However, it has been asserted that the provision of the Ohio Bill of Rights relative to due course of law is much broader than the due process clause of the fourteenth Federal Amendment." (Citing *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N.E. 672; *State v. French*, 71 Ohio St. 186; 73 N.E. 216, 104 Am. St. Rep. 770)

Of considerable import on this point is a case decided by the Supreme Court of Ohio in 1953 and involving the appellant herein, *The City of Akron v. Chapman*, 160 Ohio St. 382. The Supreme Court of Ohio at page 385 of the opinion states, in part, as follows:

"* * *

"Section 1, Article XIV, Amendments, United States Constitution, and Section 16, Article I, Ohio Constitution, both provide that no person shall be deprived of life, liberty or *property* without due process of law."

Accordingly, and in absence of specific reference, the Supreme Court of Ohio neither considered, nor was requested to consider federal "due process" but rather that provided by the Ohio Constitution.

4. The decree of the Supreme Court of Ohio rests on adequate non-federal basis.

As is clear from the opinion of the Supreme Court of Ohio (Appendix E, Jurisdictional Statement), such decree results from the consideration of three issues, only one of which was "due process". As just specified, "due process" was adjudicated under the state Constitution and the statute in question was held to be a reasonable exercise of the

police power thereunder. The two remaining issues also involved articles of the state Constitution, the home-rule amendment (Article 18, Section 3 of the Ohio Constitution) and the operation of public utilities by municipalities (Article 18, Section 4 of the Ohio Constitution). The contentions of appellant on each of these propositions were denied by the Supreme Court of Ohio, and the adjudication on any one of these questions is adequate to support the decree. Paragraph 4 of the syllabus of *Flournoy v. Wiener, Supra,* reads as follows:

> "The Supreme Court will not review a state court's decision of a Federal question where it is doubtful whether the decision does not rest on a non-Federal ground adequate to support it."

54 American Jurisprudence 801, United States Courts, Section 171, reads, in part, as follows:

> "* * * Unless the case involves a Federal question the judgment or decree therein is not reviewable in the Supreme Court, and before that Court will entertain jurisdiction to review a judgment of a state court it must affirmatively appear from the record that a real and substantial Federal question, as distinguished from one devoid of merit, frivolous, abstract, or moot, was involved, and that the decision of the state court on the Federal question was necessary to its determination of the cause. A review is precluded if the decision of the state court is upon a non-Federal ground or a point of local or general law sufficient to support the judgment. The Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state grounds or non-Federal grounds, and is the purpose of the Court as evidenced by many decisions to observe scrupulously this long-standing rule. The reason is obvious: it is found in the partitioning of power between the state and Federal judicial system and in the limitations of the Supreme Court's jurisdiction; its power over state

judgments is to correct them to the extent that they incorrectly adjudge Federal rights. The Court corrects wrong judgments, and does not revise opinions; it is not permitted to render an advisory opinion. Moreover, as a general rule the Court will not entertain jurisdiction to review a decision based upon both Federal and state grounds where the state ground is sufficient basis for the judgment rendered."

5. The appeal is not taken in conformity to the rules of this Court, Rule 15, Section (d).

Such section of Rule 15, Rules of the Supreme Court of the United States, requires specification of the stage in the proceedings and manner in which the federal questions sought to be reviewed were raised. A mere reading of the Jurisdictional Statement reveals the absence of any such compliance. As previously discussed, the only specific federal question is raised for the first time in the Notice of Appeal and the Jurisdictional Statement and such is limited to the Fifth Amendment. Such possibly accounts for the lack of the required specifications, but, in any event, such deficiency exists and should be the basis for dismissal.

For each of the foregoing reasons, it is respectfully submitted that the appeal of appellant should be dismissed.

Respectfully submitted,

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Dated September ...., 1962.